Office-Supreme Court, U.S.
FILED
JUL 29 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1188

In the Supreme Court of the United States

OCTOBER TERM, 1980

JAMES EDGAR, APPELLANT

v.

MITE CORPORATION AND MITE HOLDINGS, INC.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION AS AMICUS CURIAE

RALPH C. FERRARA
General Counsel

PAUL GONSON
Solicitor

DANIEL L. GOELZER
Associate General Counsel

JAMES R. FARRAND
Assistant General Counsel

JAMES J. JUNEWICZ
Special Counsel

DAVID C. WILSON
Attorney

Securities and Exchange Commission
Washington, D.C. 20549

LAWRENCE G. WALLACE
Acting Solicitor General

WILLIAM F. BAXTER
Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

STEPHEN M. SHAPIRO
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the Illinois Business Take-Over Act is unconstitutional under the Supremacy and Commerce Clauses of the United States Constitution.

TABLE OF CONTENTS

	Page
Interest of the Securities and Exchange Commission	1
Statement	2
Introduction and Summary of Argument	3
Argument:	
I. The Williams Act preempts the Illinois Business Take-Over Act	5
A. The Illinois statute unduly delays tender offers through mandatory hearings	8
B. The substantive fairness review and pre-commencement notification provisions of the Illinois statute conflict with the congressional design for tender offer regulation	12
1. Substantive fairness review frustrates the "market approach" adopted by Congress in the Williams Act	12
2. Pre-commencement notification violates the well-established congressional policy against advance disclosure of tender offers	14
II. The Illinois Business Take-Over Act is invalid under the Commerce Clause	18
A. The Illinois statute seeks directly to regulate interstate commerce	19
B. The Illinois statute imposes burdens on interstate commerce that greatly outweigh any putative local benefits	21
1. The Illinois statute imposes substantial burdens on interstate commerce	21
2. The invalidated provisions of the Illinois statute are not necessary to serve local objectives	24
Conclusion	29

TABLE OF AUTHORITIES

Cases: Page

Brown Shoe Co. v. *United States*, 370 U.S. 294 22
Caldwell v. *Sioux Falls Stock Yards Co.*, 242 U.S. 559 19
Canadian Pacific Enterprises (U.S.), Inc. v. *Krouse*, 506 F. Supp. 1192, appeal pending, No. 81-3083 (6th Cir., filed Feb. 17, 1981) 24
Champlin Refining Co. v. *Corporation Comm'n*, 286 U.S. 210 28
Chicago & Northwestern Transp. Co. v. *Kalo Brick & Tile*, No. 79-1336 (Mar. 9, 1981) 5
Cooley v. *Board of Wardens*, 53 U.S. (12 How.) 299 18
Florida Lime & Avocado Growers v. *Paul*, 373 U.S. 132 5
Freeman v. *Hewit*, 329 U.S. 249 18
Goldstein v. *California*, 413 U.S. 546 7
Great Atlantic & Pacific Tea Co. v. *Cottrell*, 424 U.S. 366 18
Great Western United Corp. v. *Kidwell*, 577 F. 2d 1256, rev'd on venue grounds *sub nom. Leroy* v. *Great Western United Corp.*, 443 U.S. 173 ..... *passim*
Hall v. *Geiger-Jones Co.*, 242 U.S. 539 19
Hines v. *Davidowitz*, 312 U.S. 52 ..... 4, 5, 7, 11
Hughes v. *Alexandria Scrap Corp.*, 426 U.S. 794 20
Kassel v. *Consolidated Freightways Corp.*, No. 79-1320 (Mar. 24, 1981) 28
Kennecott Corp. v. *Smith*, 507 F.Supp. 1206, appeal pending, No. 81-1679 (3d Cir., filed Apr. 1, 1981) 23
Leroy v. *Great Western United Corp.*, 443 U.S. 173 ..... 6, 19
Lewis v. *BT Investment Managers, Inc.*, 447 U.S. 27 18
Maryland v. *Louisiana*, No. 83 Orig. (May 26, 1981) 5
Merrick v. *N.W. Halsey & Co.*, 242 U.S. 568 19
New York Central R.R. v. *Winfield*, 244 U.S. 147 7
Perez v. *Campbell*, 402 U.S. 637 6
Pike v. *Bruce Church, Inc.*, 397 U.S. 137 ..... 5, 18, 20, 21

Cases—Continued Page

Piper v. *Chris-Craft Industries, Inc.*, 430 U.S. 1.... 3, 4, 8, 9, 12
Ray v. *Atlantic Richfield Co.*, 435 U.S. 151..... 7
Rondeau v. *Mosinee Paper Corp.*, 422 U.S. 49.....8, 12, 17
Shafer v. *Farmers Grain Co.*, 268 U.S. 189 ....5, 18, 20, 21
Shaffer v. *Heitner*, 433 U.S. 186 20
Southern Pacific Co. v. *Arizona*, 325 U.S. 761..... 20
TSC Industries, Inc. v. *Northway, Inc.*, 426 U.S. 438 26
World-Wide Volkswagen Corp. v. *Woodson*, 444 U.S. 286 20

Constitution, statutes, and rules:

United States Constitution:
Article I, Section 9, cl. 6 (Commerce Clause).. 3, 5, 18, 19, 20, 21
Article VI, cl. 2 (Supremacy Clause) 4, 5, 6, 12
Hart-Scott-Rodino Antitrust Improvements Act, Pub. L. No. 94-435, 90 Stat. 1383, 15 U.S.C. 12 *et seq.* 10
15 U.S.C. 18a 4, 9, 17
15 U.S.C. 18a(a)..... 17
15 U.S.C. 18a(h) 17
Securities Act of 1933, Section 18, 15 U.S.C. 77r.... 19
Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.* 1
Section 2, 15 U.S.C. 78b 24
Section 13(d), 15 U.S.C. 78m(d) 1
Section 13(e), 15 U.S.C. 78m(e) 1
Section 14(d), 15 U.S.C. 78n(d) 1, 2, 3
Section 14(d)(5), 15 U.S.C. 78n(d)(5) 25
Section 14(d)(6), 15 U.S.C. 78n(d)(6)..... 25
Section 14(d)(7), 15 U.S.C. 78n(d)(7)..... 25
Section 14(e), 15 U.S.C. 78n(e) 1
Section 14(f), 15 U.S.C. 78n(f)..... 1
Section 28(a), 15 U.S.C. 78bb(a) 6, 21
Williams Act, Pub. L. No. 90-439, 82 Stat. 454 *et seq.* 1

Constitution, statutes, and rules—Continued Page

Williams Act Amendments of 1970, Pub. L. No. 91-567, 84 Stat. 1497 *et seq.* 16
Illinois Business Take-Over Act, Ill. Ann. Stat. ch. 121½, § 137.51 *et seq.* (Smith-Hurd Cum. Supp. 1980) 2
§ 137.52.10 26
§ 137.53 23
§ 137.54.B 17
§ 137.54.E 17
§ 137.57.A 9, 10
§ 137.57.B 9
§ 137.57.C 9
§ 137.57.D 9
§ 137.57.E 13
§ 137.59.C 25
§ 137.59.D 25
§ 137.59.E 25
§§ 137.62-137.68 22
§ 137.70.D 28
Rules under Securities Exchange Act of 1934:
Rule 14d-2(b), 17 C.F.R. 240.14d-2(b) 5, 6
Rule 14d-7, 17 C.F.R. 240.14d-7 25

Miscellaneous:

E. Aranow & H. Einhorn, *Tender Offers for Corporate Control* (1973) 10
E. Aranow, H. Einhorn & G. Berlstein, *Developments in Tender Offers for Corporate Control* (1977) 18
112 Cong. Rec. 19005 (1966) 14
113 Cong. Rec. 854 (1967) 12
113 Cong. Rec. 24665 (1967) 8
122 Cong. Rec. 30877 (1976) 11
Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids: Hearings on S. 510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency, 90th Cong., 1st Sess. (1967) 12, 14, 15
H.R. 4285, 91st Cong., 2d Sess. (1970) 16

Miscellaneous—Continued

	Page
H.R. 10650, 94th Cong., 1st Sess. (1975)	16
H.R. 14317, 94th Cong., 2d Sess. (1976)	16
H.R. 14475, 90th Cong., 2d Sess. (1968)	16
H.R. Rep. No. 85, 73d Cong., 1st Sess. (1933)	19
H.R. Rep. No. 1711, 90th Cong., 2d Sess. (1968)	8, 12
H.R. Rep. No. 94-1373, 94th Cong., 2d Sess. (1976)	11, 23
Investor Protection in Corporate Takeovers—Increase in 'Regulation A' Exemption: Hearings on H.R. 4285, S. 3431 and S. 336 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce, 91st Cong., 2d Sess. (1970)	16
Langevoort, *State Tender-Offer Legislation: Interests, Effects, and Political Competency*, 62 Cornell L. Rev. 213 (1977)	21
I L. Loss, *Securities Regulation* (1961)	21
Restatement (Second) of Conflict of Laws (1971)	27
S. 2731, 89th Cong., 2d Sess. (1966)	14
S. 510, 90th Cong., 1st Sess. (1967)	15, 16
S. 3431, 91st Cong., 2d Sess. (1970)	16
S. 2522, 94th Cong., 1st Sess. (1975)	16
S. Rep. No. 550, 90th Cong., 1st Sess. (1967)	8, 10, 13, 15-16, 23
S. Rep. No. 91-1125, 91st Cong., 2d Sess. (1970)	16
Securities Exchange Act Release No. 16384, 44 Fed. Reg. 70326 (1979)	4, 5, 6
Sommer, *The Ohio Takeover Act: What Is It?*, 21 Case W. Res. L. Rev. 681 (1970)	24
Sowards & Mofsky, *Corporate Take-over Bids: Gap in Federal Securities Regulation*, 41 St. John's L. Rev. 499 (1967)	14-15
Takeover Bids: Hearing on H.R. 14475 and S. 510 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce, 90th Cong., 2d Sess. (1968)	12, 16

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1188

JAMES EDGAR, APPELLANT

v.

MITE CORPORATION AND MITE HOLDINGS, INC.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION AS AMICUS CURIAE

INTEREST OF THE SECURITIES AND EXCHANGE COMMISSION

The Securities and Exchange Commission ("Commission") is responsible for the administration and enforcement of the Securities Exchange Act of 1934, as amended, 15 U.S.C. 78a *et seq.*, of which the Williams Act is a significant part.[1] As the agency principally responsible for the achievement of the objectives of the Williams Act, the Commission has a substantial interest in the application of any potentially conflicting state scheme for the regulation of tender offers, and it also has a substantial interest in the question whether particular state securities laws with extraterritorial effects impose undue burdens on interstate commerce.

[1] The Williams Act added new Sections 13(d), 13(e), 14(d), 14(e) and 14(f) to the Securities Exchange Act of 1934. Act of July 29, 1968, Pub. L. No. 90-439, 82 Stat. 454 *et seq.* (codified at 15 U.S.C. 78m(d)-(e) and 78n(d)-(f)).

STATEMENT

This is an action seeking injunctive relief and a declaration that the Illinois Business Take-Over Act (Ill. Ann. Stat. ch. 121½, § 137.51 *et seq.* (Smith-Hurd Cum. Supp. 1980)) is unconstitutional under the Supremacy and Commerce Clauses of the United States Constitution. Appellees MITE Corporation and MITE Holdings, Inc. ("MITE") filed this action in the United States District Court for the Northern District of Illinois against the Secretary of State of Illinois, who is charged with the administration and enforcement of the Illinois statute. MITE filed its complaint on the same day that it commenced a cash tender offer for the shares of Chicago Rivet and Machine Company ("Chicago Rivet") by complying with Section 14(d) of the Securities Exchange Act of 1934, 15 U.S.C. 78n(d).[2]

The Illinois statute imposed preconditions, beyond those prescribed in the federal securities laws, to the commencement of MITE's tender offer. These included the filing of a notice of the proposed tender offer with state officials, completion of a 20-day waiting period, and—if the Illinois Secretary of State so ordered—an adjudication of the substantive fairness of MITE's offer. MITE declined to comply with these requirements and sought, in addition to declaratory relief, an injunction prohibiting the enforcement of the Illinois statute in connection with its tender offer.[3] The district court entered a preliminary injunction enjoining the Secretary of State from issuing a cease and desist order or notice of hearing

---

[2] MITE Corp. and MITE Holdings are Delaware corporations with principal executive offices in Connecticut (J.S. App. 2a). Chicago Rivet is an Illinois corporation whose shares are traded on the American Stock Exchange (*ibid.*).

[3] The Illinois Secretary of State previously had notified MITE of his intention to serve an order requiring MITE to "cease and desist all further action to make a tender offer to security holders of the Chicago Rivet & Machine Co." (J.S. App. 36a).

under the Illinois statute, or from otherwise enforcing the statute against MITE (J.S. App. 36a).

In accordance with federal law, MITE then commenced its tender offer and published notice thereof in the national edition of the Wall Street Journal. The tender offer represented a proposed transaction in interstate commerce in excess of $23 million, and extended to all shareholders of Chicago Rivet residing throughout the United States (J.S. App. 5a). The tender offer price per share was $28, which represented a premium of more than $4 per share over the market price in the period immediately preceding the announcement of the offer (*id.* at 33a-34a).

Following a hearing on MITE's motion for a permanent injunction, the district court entered a final judgment in favor of MITE (J.S. App. 32a-41a). The court declared the Illinois statute to be both preempted by the Williams Act and an undue burden on interstate commerce. The district court therefore permanently enjoined enforcement of the Illinois statute against MITE (*id.* at 41a).

The court of appeals affirmed (J.S. App. 1a-31a). The court of appeals agreed with the district court that several provisions of the Illinois statute frustrate the congressional purposes underlying the Williams Act and therefore are preempted (*id.* at 6a-23a). The court also found that the Illinois statute substantially obstructs interstate commerce without being necessary to the achievement of any significant local objective, in contravention of the Commerce Clause (*id.* at 24a-30a).

INTRODUCTION AND SUMMARY OF ARGUMENT

1. Congress enacted the Williams Act amendments to the Securities Exchange Act in response to the increasing use of cash tender offers for corporate acquisitions. See generally *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 22-23 (1977). Section 14(d) of the Act, 15 U.S.C. 78n(d), requires disclosure of material information at

the time a tender offer is first made and also embodies certain substantive protections, including those establishing withdrawal rights, requiring pro rata acceptance of tendered shares in an oversubscribed partial offer, and mandating equal consideration for tendering shareholders. See J.S. App. 11a.

Pursuant to its rulemaking authority, the Commission has promulgated detailed rules governing the conduct of tender offers. See Securities Exchange Act Release No. 16384, 44 Fed. Reg. 70326 (1979). Together, the Williams Act and the Commission's rules provide a comprehensive framework for the protection of security holders confronted with a tender offer.

2. A state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" embodied in federal law must yield, under the Supremacy Clause, to the federal legislation. *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). In enacting and subsequently amending the Williams Act, and in enacting the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. 18a, Congress sought to protect investors confronted with a tender offer through a "policy of neutrality in contests for control." *Piper* v. *Chris-Craft Industries, Inc.*, *supra*, 430 U.S. at 29. The Illinois statute stands as an obstacle to the achievement of Congress' goal of neutrality because the statute's provisions requiring mandatory hearings, substantive fairness review, and pre-commencement notification tip the balance of advantage in favor of the subject company's incumbent management. Moreover, the statute's substantive fairness review and advance disclosure provisions contravene congressional policy against such provisions as exemplified by Congress' adoption of a "free market" approach to tender offer regulation and its repeated and deliberate refusal to require advance disclosure under federal law. The Illinois statute therefore is invalid under the Supremacy Clause.

3. The Illinois statute represents an attempt by the state to exercise extraterritorial jurisdiction. Because

the Commerce Clause prohibits a state from directly regulating commerce in other states (*Shafer* v. *Farmers Grain Co.*, 268 U.S. 189, 199 (1925)), the Illinois statute is invalid. Moreover, even when a state statute regulates interstate commerce only indirectly or in its local aspects, the burden imposed on that commerce must not be excessive in relation to the local interests furthered by the statute. *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Because the Illinois statute substantially obstructs interstate commerce without significantly promoting local interests, it fails to satisfy the requirements of the Commerce Clause.[4]

ARGUMENT

I. THE WILLIAMS ACT PREEMPTS THE ILLINOIS BUSINESS TAKE-OVER ACT

The issue before this Court is whether the Illinois take-over statute "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz, supra*, 312 U.S. at 67. See also *Maryland* v. *Louisiana*, No. 83 Orig. (May 26, 1981), slip op. 20; *Chicago & Northwestern Transp. Co.* v. *Kalo Brick & Tile*, No. 79-1336 (Mar. 9, 1981), slip op. 5-6.[5] This inquiry requires a "careful comparison of

---

[4] The Supremacy and Commerce Clause issues discussed in this brief are treated at greater length at pages 15-62 of the Commission's brief amicus curiae in *Leroy* v. *Great Western United Corp.*, No. 78-759 (referred to hereinafter as "*Leroy* Amicus Br.").

[5] A preemptive conflict also will be found when "compliance with both federal and state regulations is a physical impossibility." *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143 (1963). Although we do not contend that the Illinois statute stands in direct operational conflict with the Williams Act, the Illinois statute does conflict with a recently promulgated Commission rule.

Pursuant to its rulemaking authority under the Securities Exchange Act and the Williams Act, the Commission has promulgated detailed rules governing the conduct of tender offers. See Securities Exchange Act Release No. 16384, 44 Fed. Reg. 70326 (1979). Rule 14d-2(b), 17 C.F.R. 240.14d-2(b), requires that a tender

the terms of the Williams Act" with those of the Illinois statute (J.S. App. 9a).[6]

---

offeror, within five days of making a public announcement of the material terms of the offer, either make its offer effective by disseminating specified information to security holders and filing the requisite documents with the Commission or announce that it is withdrawing its offer. Rule 14d-2(b) stands in direct operational conflict with the advance disclosure provisions of state takeover laws. Such state law provisions forbid precisely what the federal rule requires—the prompt commencement of the tender offer once the offeror has publicly disclosed the material terms thereof. See 44 Fed. Reg. 70329-70330 (1979). Accordingly, federal and state courts uniformly have held that Rule 14d-2(b) preempts the pre-commencement filing requirements of state takeover statutes. The cases are collected at page 6 n.6 of our brief *amicus curiae* at the jurisdictional stage. See also *id.* at 4-5.

Because the events at issue in this litigation occurred before the effective date of Rule 14d-2(b), and the new rules expressly provide that their application will be prospective only, the court of appeals did not base its decision on the new rule, although it correctly observed that Rule 14d-2(b) would "directly conflict" with the pre-commencement disclosure provisions of the Illinois statute (J.S. App. 23a n.25).

[6] See *Perez* v. *Campbell*, 402 U.S. 637, 644 (1971). In addition to the proscriptions embodied in the Supremacy Clause, Congress expressly has forbidden attempts by the states to regulate securities transactions in a manner that would undermine or conflict with the operation of federal law. Section 28(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78bb(a), bars any state from enacting a law that conflicts with either the Securities Exchange Act or any rules or regulations promulgated thereunder. Section 28(a) provides in pertinent part (emphasis added):

> Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person *insofar as it does not conflict with* the provisions of this chapter or the rules and regulations thereunder.

Section 28(a) "was designed to save state blue-sky laws from preemption." *Leroy* v. *Great Western United Corp.*, 443 U.S. 173, 182 n.13 (1979). Its terms establish, however, that when state law conflicts with the federal securities laws, the state law must yield, since "Section 28 essentially restates the supremacy clause, making it a statutory as well as a constitutional requirement." *Great Western United Corp.* v. *Kidwell*, 577 F.2d 1256, 1271 (5th

Achievement of the goals of a federal statute often depends on adherence to deliberately selected limitations on the scope of regulation. The congressional plan may include an important role for unfettered private decision-making. In such cases, preservation of the line between what the law regulates and what it leaves alone may be essential to the success of the statutory strategy. This is especially clear when, as here, the legislative history of a federal statute shows that Congress intended to strike a balance between the interests of affected persons and rejected more far-reaching regulatory requirements or constraints. A state law that disturbs the congressionally-selected balance among interested persons by imposing more extensive or restrictive regulation obstructs "the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, *supra*, 312 U.S. at 67. See also *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978); *Goldstein* v. *California*, 412 U.S. 546, 569-570 (1973); *New York Central R.R.* v. *Winfield*, 244 U.S. 147, 153-154 (1917).

As we demonstrate below, the Illinois statute clashes with Congress' fundamental objectives in enacting the Williams Act. In particular, the Illinois statute (a) provides for hearings of potentially unlimited duration, which incumbent management often may initiate, whereas Congress has determined that delay in commencing tender offers causes serious harm to shareholders; (b) empowers a state official to pass upon the substantive fairness of a tender offer and to block it altogether on the theory that it is "inequitable," whereas Congress has mandated individual decision-making by shareholders possessing material facts about the transaction; and (c) imposes a lengthy pre-commencement notification requirement on tender offerors, whereas Congress repeatedly has rejected such a requirement.

Cir. 1978), rev'd on venue grounds *sub nom. Leroy* v. *Great Western United Corp.*, *supra*. Section 28(a) is discussed at greater length at *Leroy* Amicus Br. 18-19 & n.15, 38-39 & n.38, and in *Great Western United Corp.* v. *Kidwell*, *supra*, 577 F.2d at 1275-1276 & n.39.

A. The Illinois Statute Unduly Delays Tender Offers Through Mandatory Hearings

In enacting the Williams Act amendments, Congress sought to ensure that "public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate information regarding the qualifications and intentions of the offering party." *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49, 58 (1975) (footnote omitted); see S. Rep. No. 550, 90th Cong., 1st Sess. 2 (1967) ("Senate Report"). At the same time, however, Congress recognized that "takeover bids should not be discouraged because they serve a useful purpose in providing a check on entrenched but inefficient management." *Id.* at 3; see also 113 Cong. Rec. 24665 (1967) (colloquy between Senator Javits and Senator Williams).

In order to achieve its goal of protecting shareholders without depriving them of the opportunity to benefit from tender offers, Congress struck a balance that constitutes a federal "policy of neutrality in contests for control." *Piper* v. *Chris-Craft Industries, Inc.*, *supra*, 430 U.S. at 29. The drafters of the Williams Act emphasized that they had taken "extreme care to avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid" and that the bill was "designed to require full and fair disclosure for the benefit of investors while at the same time providing the offerer and management equal opportunity to fairly present their case." Senate Report at 3; H.R. Rep. No. 1711, 90th Cong., 2d Sess. 4 (1968) ("House Report"); see *Rondeau* v. *Mosinee Paper Corp.*, *supra*, 422 U.S. at 58-59. Indeed, as this Court noted in *Piper* v. *Chris-Craft Industries, Inc.*, *supra*, 430 U.S. at 29-30, the essential relationship between Congress' policy of neutrality and its purpose to protect investors is underscored by the fact that statements concerning the need for neutrality are contained in the sections of the House and Senate Reports entitled "Protection of Investors." See Senate Report at 3; House Report at 4. Congress recently reaffirmed its view that the "basic pur-

pose" of the Williams Act is to ensure neutrality between offerors and subject companies when it enacted the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. 18a.[7]

An effective method for upsetting this regulatory balance, and one that the Illinois statute adopts, is to interject extended delay in the tender offer process. The Illinois statute empowers the Secretary of State to call a hearing concerning any tender offer subject to that law. Ill. Ann. Stat. ch. 121½, § 137.57.A (Smith-Hurd Cum. Supp. 1980). The offer may not proceed until the hearing is completed. *Id.* at § 137.57.B. The Secretary may call a hearing at any time during the waiting period prior to the effective date of the offer (*id.* at § 137.57.A), and the statute provides no deadline for completion of the adjudicatory proceeding. *Id.* at § 137.57.C-D. Finally, once the hearing has been concluded, the Secretary is accorded 15 business days to render a decision. *Id.* at § 137.57.D. But that period may be extended without limitation. *Ibid.* Thus, the Illinois statute provides for hearings of potentially unlimited duration, which must be completed before the tender offer may commence.

---

[7] See pages 10-11, *infra*. Appellant argues (Br. 16-17) that, since investor protection rather than neutrality is the basic objective of the Williams Act, the fact that the Illinois statute alters the balance between incumbent management and the offeror does not thwart any congressional purpose. However, as noted above, Congress believed that a policy of strict neutrality is essential for the protection of investors. Moreover, appellant relies (Br. 16) on a misconstruction of this Court's statement in *Piper* v. *Chris-Craft Industries, Inc., supra*, 430 U.S. at 29, that neutrality "does not go * * * to the purpose of the legislation." In *Piper*, this Court was faced only with the question whether Congress' objectives in enacting the Williams Act permitted the Court to "read into" the Act a private right of action for unsuccessful offerors (*id.* at 24). The Court simply found that the "congressional policy of 'evenhandedness' is nonprobative of the quite disparate proposition that the Williams Act was intended to confer rights for money damages upon an injured takeover bidder" (*id.* at 31). This case presents the unrelated question whether a state law that undermines that "congressional policy of 'evenhandedness' " impermissibly obstructs the federal scheme.

The hearing provisions of the Illinois statute also potentially accord incumbent management "a powerful weapon to stymie indefinitely a takeover" (J.S. App. 13a). The Secretary is required to call a hearing if requested to do so by, among other persons, Illinois residents holding 10% of the subject company's shares. Ill. Ann. Stat. ch. 121½, § 137.57.A (Smith-Hurd Cum-Supp. 1980). Since incumbent management in many cases will control, either directly or indirectly, the requisite number of shares (see J.S. App. 14a), this provision effectively empowers management to initiate protracted hearings.

As the Fifth Circuit noted in *Great Western United Corp.* v. *Kidwell*, 577 F.2d 1256, 1278 & n. 49 (1978): "Most observers of takeover battles agree that time is among the most effective weapons available to a company resisting a tender offer." [8] When it enacted the Williams Act, "Congress recognized that delay can seriously impede a tender offer" (*id.* at 1277; see Senate Report at 4), and it re-emphasized that same judgment when it enacted the Hart-Scott-Rodino Antitrust Improvements Act, Pub. L. No. 94-435, 90 Stat. 1383, 15 U.S.C. 12 *et seq.* For example, the House Report on that legislation stated:

> [I]t is clear that this short waiting period [the ten-day period for proration provided by Section 14(d)(6) of the Securities Exchange Act] was founded on congressional concern that a longer delay might unduly favor the target firm's incumbent management, and permit them to frustrate many pro-competitive cash tenders. This ten-day waiting period thus underscores the basic purpose of the Williams Act—to maintain a neutral policy towards

---

[8] Among other things, delay enables a subject company to: (1) repurchase its own securities; (2) announce dividend increases or stock splits; (3) issue additional shares of stock; (4) acquire other companies to produce an antitrust violation should the tender offer succeed; (5) arrange a defensive merger; (6) enter into restrictive loan agreements; and (7) institute litigation challenging the tender offer. See, *e.g.*, E. Aranow & H. Einhorn, *Tender Offers for Corporate Control* 242-249, 254-258, 266-268, 274-276 (1973).

> cash tender offers, by avoiding lengthy delays that might discourage their chances for success.[9]

Representative Rodino, in explaining the relationship between the Hart-Scott-Rodino Act and the Williams Act, emphasized the negative consequences for shareholders of lengthy delays in the tender offer process.[10]

The congressional judgment therefore is clear—extended delay in tender offers unduly favors subject company management at the expense of shareholders. In sharp contrast, the hearing provisions of the Illinois statute facilitate substantial delay, and incumbent management can itself bring about that delay. The statute thus "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (*Hines* v. *Davidowitz*, *supra*, 312 U.S. at 67), and therefore must yield to federal law. *Great Western United Corp.* v. *Kidwell*, *supra*, 577 F.2d at 1277-1280.

---

[9] H.R. Rep. No. 94-1373, 94th Cong., 2d Sess. 12 (1976). See also note 19, *infra*.

[10] See 122 Cong. Rec. 30877 (1976):

> In the case of cash tender offers, more so than in other mergers, the equities include time and the danger of undue delay. This bill in no way intends to repeal or reverse the congressional purpose underlying the 1968 Williams Act, or the 1970 amendments to that act. * * * Lengthier delays will give the target firm plenty of time to defeat the offer, by abolishing cumulative voting, arranging a speedy defensive merger, quickly incorporating in a State with an antitakeover statute, or negotiating costly lifetime employment contracts for incumbent management. And the longer the waiting period, the more the target's stock may be bid up in the market, making the offer more costly—and less successful. Should this happen, it will mean that shareholders of the target firm will be effectively deprived of the choice that cash tenders give to them: Either accept the offer and thereby gain the tendered premium, or reject the offer. Generally, the courts have construed the Williams Act so as to maintain these two options for the target company's shareholders, and the House conferees contemplate that the courts will continue to do so.

B. The Substantive Fairness Review And Pre-Commencement Notification Provisions Of The Illinois Statute Conflict With The Congressional Design For Tender Offer Regulation

Wholly apart from the question whether Congress in enacting the Williams Act intended to create a regulatory balance between bidder and subject company, the Illinois statute violates the Supremacy Clause by (1) enabling the state administrator to pass on the substantive fairness of the tender offer and (2) requiring pre-commencement notification of the offer's material terms. In both of these respects, the Illinois statute frustrates the congressional design for regulation of tender offers.

1. *Substantive fairness review frustrates the "market approach" adopted by Congress in the Williams Act*

Congressional deliberations in enacting the Williams Act focused primarily on the importance of providing shareholders with information needed to decide whether to tender their shares. See 113 Cong. Rec. 854 (1967); *Piper* v. *Chris-Craft Industries, Inc.*, *supra*, 430 U.S. at 26-31; *Rondeau* v. *Mosinee Paper Corp.*, *supra*, 422 U.S. at 58. Similarly, the hearings on the legislation emphasized the need "to get information to the investor by allowing both the offeror and the incumbent managers of a target company to present fully their arguments and then to let the investor decide for himself." [11] The House and Senate Reports underscore Congress' intention that shareholders, informed through full disclosure by both sides in the contest, be the actual decision-makers in the tender offer process: "This bill is designed to

---

[11] *Great Western United Corp.* v. *Kidwell*, *supra*, 577 F.2d at 1276, citing *Takeover Bids: Hearing on H.R. 14475 and S. 510 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 90th Cong., 2d Sess. 4, 47-48 (1968) ("*House Hearings*"); *Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids: Hearings on S. 510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 17, 19, 25, 182 (1967) ("*Senate Hearings*").

make the relevant facts known so that shareholders have a fair opportunity to make their decision." Senate Report at 3; House Report at 4.

The Illinois statute threatens to undermine Congress' free market approach. Under § 137.57.E of the Illinois statute, the Secretary of State is empowered to pass upon the substantive fairness of a tender offer. He is required to deny registration to any offer, even one at a premium over the current market price, that he deems "inequitable." Thus, the Illinois statute replaces the investor autonomy contemplated by the Williams Act with the judgment of a state official.[12]

This gives rise to a fundamental conflict with the objective of the federal law. Nowhere on the face of the federal statute or in the legislative history is it suggested that anyone other than shareholders are to judge

---

[12] Contrary to the suggestion of Amicus North American Securities Administrators Association, Inc. (Br. 11-13), the Commission does not countenance substantive fairness review of tender offers, but merely has recognized that other government bodies may assess the adequacy of disclosure as well as the regulatory implications of proposed business combinations. For example, the Antitrust Division of the Department of Justice reviews proposed acquisitions to ensure compliance with the antitrust laws but, unlike the State of Illinois, is not empowered to pass on whether a particular offer is "inequitable."

Appellant argues (Br. 21-22) that the Illinois statute does not permit the Secretary to adjudicate the substantive fairness of a tender offer. This argument, advanced by appellate counsel without supporting authority, ignores the wording of the statute, which directs the Secretary to deny registration to a tender offer on the basis that it "fails to provide full and fair disclosure to the offerees of all material information concerning the take-over offer, *or that the take-over offer is inequitable* or would work or tend to work a fraud or deceit upon the offerees * * *." Ill. Ann. Stat. ch. 121½, § 137.57.E (Smith-Hurd Cum. Supp. 1980) (emphasis added). The statute thus speaks in the disjunctive, making fraud, deceit, failure to disclose material information, as well as the inequitable character of the offer, separate grounds for denial of registration. Appellant cites no "apparent legislative purpose" (Br. 22 n.8) to support a substitution of the word "and" for "or". Moreover, counsel's unsupported suggestion relates to only one of the infirmities in the Illinois statute discussed in this brief.

the merits of a tender offer.[13] To the contrary, Congress' consistent objective was to provide investors full and fair disclosure to enable them to make informed decisions and thus determine their own economic self-interest. *Great Western United Corp.* v. *Kidwell, supra*, 577 F.2d at 1276-1277. Because the Illinois statute adopts an inconsistent approach, it stands as an obstacle to the accomplishment and execution of this congressional purpose, and therefore is preempted. See *id.* at 1279.

2. Pre-commencement notification violates the well-established congressional policy against advance disclosure of tender offers

In considering various bills, both before and after enacting the Williams Act, Congress focused on the issue of pre-commencement notification. Congress debated and deliberately rejected proposals to require pre-commencement disclosure by tender offerors on six separate occasions, concluding that such disclosure would harm investors and injure the trading markets.

In October 1965, Senator Williams introduced S. 2731, 89th Cong., 2d Sess. (1966), a bill that would have required that a tender offeror notify the subject company and file a public statement with the Commission containing specified information at least 20 days prior to commencing a cash tender offer. The Commission commented on the bill and observed that "the requirement of a 20-day advance notice to the issuer and the Commission is unnecessary for the protection of security holders * * *." 112 Cong. Rec. 19005 (1966).[14]

---

[13] When the Williams Act was being considered, the Commission opposed all suggestions that it be granted authority to evaluate the substantive merits of a tender offer. See *Senate Hearings* at 33 (statement of Chairman Cohen).

[14] Chairman Cohen noted that such an advance notice requirement would give incumbent management "a period in which to mobilize its resources and take action against the offer, at a time when the offeror could not solicit tenders or otherwise make his case." Sowards & Mofsky, *Corporate Take-over Bids: Gap in*

Senator Williams thereafter introduced a new bill, S. 510, 90th Cong., 1st Sess. (1967). That bill would have provided for a confidential filing by the tender offeror with the Commission five days prior to commencement of the offer. Stock exchange officials and other industry representatives testified against that pre-commencement filing requirement on the ground that such requirements have deleterious market effects, including the potential for market disruption, shareholder confusion, and insider trading. See, *e.g.*, *Senate Hearings at* 71-76, 84-85, 87-89, 98, 105, 108-111, 139-140, 151 and 163. For example, Donald J. Calvin, Vice President of the New York Stock Exchange, testified (*id.* at 72):

> If word of the impending offer becomes public, the price of the stock will rise toward the expected tender price. Thus, the primary inducement to stockholders—an offer to purchase their shares at an attractive price above the market—is lost, and the offeror may be forced to abandon its plans or to raise the offer to a still higher price. The cost of an offer to purchase hundreds of thousands of shares might prove prohibitive if the price had to be increased only a few dollars per share.

The Senate's rejection of a pre-commencement filing requirement was explained in the Senate Report as follows:

> At the hearings it was urged that this prior review was not necessary and in some cases might delay the offer when time was of the essence. In view of the authority and responsibility of the Securities and Exchange Commission to take appropriate action in the event that inadequate or misleading information is disseminated to the public to solicit acceptance of a tender offer, the bill as approved by the committee requires only that the statement be on file with the Securities and Exchange Commission at the time the tender offer is first made to the public.

Federal Securities Regulation, 41 St. John's L. Rev. 499, 514 (1967) (quoting M. Cohen, Address to the American Society of Corporate Secretaries, Inc., June 28, 1966).

Senate Report at 4; see also *Great Western United Corp. v. Kidwell, supra*, 577 F.2d at 1283 n.55. Similarly, when the House considered the companion bill in 1968, it also rejected the imposition of a pre-commencement filing requirement.[15] After elimination of any advance disclosure requirement, S. 510 was enacted as the Williams Act.

During deliberations on the 1970 amendments to the Williams Act, Pub. L. No. 91-567, 84 Stat. 1497 *et seq.*, the House subcommittee again considered and rejected proposals for pre-commencement disclosure by tender offerors. The proposed House bill, H.R. 4285, 91st Cong., 2d Sess. (1970), would have required a tender offeror to provide 30 days' advance notice to both the Commission and the subject company.[16] The House bill was not reported out of the subcommittee. Instead, the Senate amendments to the Williams Act were adopted, and they did not contain a requirement of pre-commencement notification.[17]

---

[15] The House bill, H.R. 14475, 90th Cong., 2d Sess. (1968), contained the pre-commencement filing requirement that was included in S. 510 as originally introduced. This provision was again criticized on the ground that it would cause market disruptions (see, *e.g.*, *House Hearings* at 44-46, 50), and the House ultimately enacted S. 510, from which, as noted above, the Senate had deleted the pre-commencement filing requirement.

[16] *See Investor Protection in Corporate Takeovers—Increase in 'Regulation A' Exemption: Hearings on H.R. 4285, S. 3431 and S. 336 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 2d Sess. 6-7 (1970). During the hearings, the Commission supported S. 3431, which did not contain an advance notice provision. See *id.* at 21 (statement of Chairman Budge).

[17] See S. Rep. No. 91-1125, 91st Cong., 2d Sess. (1970). In addition, two bills introduced in the 94th Congress would have amended the Williams Act to require a filing with the Commission 60 days before commencement of the offer. S. 2522, 94th Cong., 1st Sess. § 3 (1975); H.R. 10650, 94th Cong., 1st Sess. § 3 (1975). A third bill would have required such a filing, and its transmission to the subject company, at least 21 days prior to commencement. H.R. 14317, 94th Cong., 2d Sess. § 5 (1976). None of those bills was reported out of committee.

Thus, over a period of more than ten years, Congress has on at least six occasions considered imposing an advance disclosure requirement on tender offerors. In each instance Congress deliberately rejected such a proposal because of the danger of market disruption and a concern that advance notice would enable incumbent management to thwart tender offers to the detriment of shareholders. Congress was determined that disclosure not be converted into a weapon in the hands of incumbent management. See *Rondeau* v. *Mosinee Paper Corp.*, *supra*, 422 U.S. at 58:

> By requiring disclosure of information to the target corporation as well as the Securities and Exchange Commission, Congress intended to do no more than give incumbent management an opportunity to express and explain its position. The Congress expressly disclaimed an intention to provide a weapon for management to discourage takeover bids * * *.

In sharp contrast to the federal regulatory scheme, the Illinois statute imposes on tender offerors what is in effect a 20-day pre-commencement notification requirement.[18] Imposition by Illinois of such a requirement would bring about the very result that Congress sought to avoid.[19] In this respect, the Illinois statute stands as

---

[18] See Ill. Ann. Stat. ch. 121½ §§ 137.54.E, 137.54.B (Smith-Hurd Cum. Supp. 1980).

[19] Unlike the Illinois statute—which delays indefinitely the commencement of a tender offer until the bidder has complied with the statute's pre-commencement filing and review provisions—the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. 18a, merely precludes a bidder from purchasing tendered shares until it has received clearance from the Federal Trade Commission and the Department of Justice, both of which must act within a carefully limited time frame. 15 U.S.C. 18a(a). It does not delay the commencement of the offer or the tendering of shares to the bidder's escrow agent. Moreover, the Hart-Scott-Rodino Act does not require, as does the Illinois statute, that the bidder make a public announcement of the material terms of its offer in the pre-commencement period. To the contrary, the Act provides for confidential treatment of the bidder's filing. 15 U.S.C. 18a(h).

an obstacle to the accomplishment and execution of Congress' full purposes and objectives as embodied in the Williams Act, and accordingly is preempted. See E. Aranow, H. Einhorn & G. Berlstein, *Developments in Tender Offers for Corporate Control* xix (1977) (remarks of Senator Williams).

II. THE ILLINOIS BUSINESS TAKE-OVER ACT IS INVALID UNDER THE COMMERCE CLAUSE

At least since this Court's decision in *Cooley* v. *Board of Wardens*, 53 U.S. (12 How.) 299 (1852), "it has been clear that 'the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States * * *. [T]he Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States.' " *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. 366, 370-371 (1976), quoting *Freeman* v. *Hewit*, 329 U.S. 249, 252 (1946). Thus, the Commerce Clause permits only incidental regulation of interstate commerce by the states (*Shafer* v. *Farmers Grain Co.*, 268 U.S. 189, 199 (1925)), and then only to the extent that such regulation serves legitimate local interests and does not impose an excessive burden on interstate commerce in relation to the putative local benefits. *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). See also *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 35-37 (1980).

The Illinois statute violates these principles for two separate reasons. First, the statute purports directly to regulate interstate commerce through the exercise of extraterritorial jurisdiction. *Shafer* v. *Farmers Grain Co.*, *supra*. Second, the statute imposes a burden on interstate commerce that is clearly excessive when viewed in light of the local interests the statute purportedly serves. *Pike* v. *Bruce Church, Inc.*, *supra*.

A. The Illinois Statute Seeks Directly To Regulate Interstate Commerce

In our federal system, state governments are empowered to regulate *intrastate* securities transactions. This Court has upheld against Commerce Clause challenge the authority of states to enact "blue-sky" laws to regulate local security sales,[20] but it has rested its holdings on the fact that the transactions in question occurred within the borders of the regulating states.[21] Congress also has acknowledged the validity of traditional blue-sky laws in regulating *intrastate* transactions.[22]

However, the state law now before this Court has a far more ambitious objective. The Illinois statute purports to regulate an offer made by a Delaware corporation based in Connecticut to shareholders residing across the nation. More than 70% of those shareholders reside outside of Illinois. Illinois seeks directly to regulate these multimillion dollar interstate transactions even though they take place entirely outside of the state's boundaries. The Illinois statute thus constitutes an attempt by the state to exercise a direct and intrusive form of extra-

---

[20] *Hall* v. *Geiger-Jones Co.*, 242 U.S. 539 (1917); *Caldwell* v. *Sioux Falls Stock Yards Co.*, 242 U.S. 559 (1917); *Merrick* v. *N.W. Halsey & Co.*, 242 U.S. 568 (1917).

[21] See, *e.g.*, *Hall* v. *Geiger-Jones Co.*, *supra*, 242 U.S. at 557, where this Court observed (emphasis in the original):

> The provisions of the law * * * apply to dispositions of securities *within* the State and while information of those issued in other States and foreign countries is required to be filed * * *, they are only affected by the requirement of a license of one who deals in them *within* the State.

[22] In explaining the savings clause in Section 18 of the Securities Act of 1933, 15 U.S.C. 77r, the House Report emphasized that the clause "carefully preserves the jurisdiction of State security commissions to regulate transactions *within their own borders.*" H.R. Rep. No. 85, 73d Cong., 1st Sess. 10 (1933) (emphasis added). It was this form of local regulation that Congress sought to "save * * * from preemption" through the savings clause in the Securities Exchange Act. *Leroy* v. *Great Western United Corp.*, *supra*, 443 U.S. at 182 n.13.

territorial jurisdiction that would block sales of securities beyond its borders.

This Court has long emphasized that no state may directly regulate commerce in other states.[23] In *Shafer* v. *Farmers Grain Co., supra*, 268 U.S. at 199, the Court held that

> a state statute which by its necessary operation directly interferes with or burdens * * * [interstate] commerce is a prohibited regulation and invalid, regardless of the purpose with which it was enacted.

See also *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794, 806 (1976) ("[t]he common thread of * * * [cases such as *Shafer*] is that the State interfered with the natural functioning of the interstate market either through prohibition or through burdensome regulation"). Similarly, this Court in *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 775 (1945), struck down on Commerce Clause grounds a state law where the "practical effect of such regulation is to control * * * [conduct] beyond the boundaries of the state * * *."[24]

Like the laws struck down in *Shafer* and *Southern Pacific*, the Illinois statute represents "an attempt by the State to prescribe rules under which an important part of * * * [interstate] commerce shall be conducted." *Shafer* v. *Farmers Grain Co., supra*, 268 U.S. at 201. Because it purports directly to regulate conduct occurring wholly outside the state, the Illinois statute lacks pre-

---

[23] Although in Commerce Clause cases this Court occasionally undertakes a balancing approach (see, *e.g.*, *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761 (1945)), "more frequently it has spoken in terms of 'direct' and 'indirect' effects and burdens" on interstate commerce. *Pike* v. *Bruce Church, Inc., supra*, 397 U.S. at 142, citing *Shafer* v. *Farmers Grain Co., supra*.

[24] The limits on a state's power to enact substantive legislation are similar to the limits on the jurisdiction of state courts. In either case, "any attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power." *Shaffer* v. *Heitner*, 433 U.S. 186, 197 (1977). See *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 292 (1980).

cisely that feature that validated the blue-sky laws this Court previously has upheld, and upon which Congress based its approval of such laws.[25] The Commerce Clause precludes the application of a statute such as the Illinois takeover law to commerce that takes place outside the enacting state's borders, whether or not the interstate commerce has effects within the state. *Shafer* v. *Farmers Grain Co., supra*, 268 U.S. at 199-203.

B. The Illinois Statute Imposes Burdens On Interstate Commerce That Greatly Outweigh Any Putative Local Benefits

Even when a state statute regulates interstate commerce only incidentally or indirectly, the burden imposed on that commerce must not be excessive in relation to the local interests furthered by the statute. *Pike* v. *Bruce Church, Inc., supra*, 397 U.S. at 142. Moreover, this Court in Commerce Clause cases has looked to whether the local interests assertedly furthered by the statute "could be promoted as well with a lesser impact on interstate activities." *Ibid.*; see also *Great Western United Corp.* v. *Kidwell, supra*, 577 F.2d at 1285.

1. *The Illinois statute imposes weighty burdens on interstate commerce*

The most obvious burden that the Illinois statute imposes on interstate commerce arises from what the court of appeals described as the statute's preclusive impact (J.S. App. 28a-29a; footnote omitted):

> Once the Act has been invoked, all purchases, or offers to purchase by the offeror, of the target company's stock pursuant to a tender offer may be halted, including transactions to be executed entirely

---

[25] See notes 20-22, *supra*, and accompanying text. The savings clause in the Securities Exchange Act of 1934, 15 U.S.C. 78bb(a) (see note 6, *supra*), is understood to have preserved only the traditional jurisdiction of state securities commissions. See I L. Loss, *Securities Regulation* 156 & n.89 (1961); Langevoort, *State Tender-Offer Legislation: Interests, Effects, and Political Competency*, 62 Cornell L. Rev. 213, 247 (1977).

> outside the boundaries of Illinois. The Illinois Act thus possesses a significant potential to cause commercial disruption. For example, had the Secretary of State not been enjoined from going forward in the instant case, over 23 million dollars of interstate commerce would presumably have been affected.

See also *Great Western United Corp.* v. *Kidwell, supra*, 577 F.2d at 1286 ("[i]n this case, * * * [the state's] law halted over 31 million dollars of interstate commerce"). Illinois enforces obedience to its statute with substantial civil and criminal sanctions, and an exercise of long-arm jurisdiction. See Ill. Ann. Stat. ch. 121½, §§ 137.62-137.68 (Smith-Hurd Cum. Supp. 1980).

The threat of widespread "commercial disruption" is inherent in the Illinois statute because of its unlimited extraterritorial reach. As applied in this case, the statute purports to grant Illinois the right to determine when, if ever, a nationwide tender offer made to shareholders—more than 70% of whom reside outside of Illinois—can proceed. Illinois thus has arrogated to itself authority to block tender offers not just in that state in accordance with traditional blue-sky law (see notes 20-22, *supra*, and accompanying text), but in every other state.[26]

---

[26] The Illinois statute empowers a single state official to block tender offers that, in the judgment of that official, are "inequitable." The impact on the economy of such permanent blockages of tender offers can be substantial. Not only are shareholders across the country deprived of the opportunity to sell their shares at a significant premium, but the incumbent management of subject companies is entrenched and effectively immunized from challenge. If, however, shareholders are permitted freely to tender their shares in situations in which they elect to do so, a tender offer allows economic resources to gravitate to their highest valued use in the hands of a successful bidder. Inefficient management may thus be replaced, and the productive capacity of the acquired firm may be combined within a new economic complex, subject to federal antitrust standards. See *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 319 (1962); see also pages 10-11, *supra*. This reallocation of resources to their highest valued use through tender offers can serve as a stimulus to efficiency and competition, goals

Moreover, the burden on interstate commerce is not limited to that resulting from the Illinois statute operating in isolation. Other states with such statutes can assert overlapping jurisdiction with respect to a tender offer. In this case, for example, the subject company attempted to invoke the Pennsylvania takeover law.[27] Exposure to complex and divergent state requirements necessarily renders a tender offeror's task of complying with all applicable laws extremely difficult. The problem is particularly acute in the tender offer context where "time [is] of the essence." Senate Report at 4; see *Kennecott Corp.* v. *Smith*, 507 F. Supp. 1206, 1224 (D.N.J. 1981), appeal pending, No. 81-1679 (3d Cir., filed Apr. 1, 1981).

Finally, enforcement of the pre-commencement notification and filing provisions of the Illinois statute can disrupt the orderly functioning of the nation's secondary securities markets. The Illinois statute requires a tender offeror to announce publicly the material terms of its

---

fundamental to both the Commerce Clause and federal antitrust legislation. Moreover, the ever-present possibility of a takeover provides incumbent management with continuous incentives to perform effectively, thus overcoming the inertia implicit in unchallenged corporate control. See H.R. Rep. No. 94-1373, 94th Cong., 2d Sess. 12 (1976).

[27] See J.S. App. 3a-4a. As the court of appeals recognized (*id.* at 29a n.31), the Illinois statute has a comity provision exempting from the statute's registration and filing requirements a tender offer that is being regulated by another state. Ill. Ann. Stat. ch. 121½, § 137.53 (Smith-Hurd Cum. Supp. 1980). For this provision to be applicable, however, the Secretary of State must find that the other state's takeover law is being applied and accords Illinois shareholders protections "substantially equal" to those provided by the Illinois statute. *Ibid.* The statute does not specify what constitutes substantial equality. See J.A. H-2. Moreover, it is rarely clear at the outset of a tender offer whether a state's takeover statute will apply. Indeed, in this case the Pennsylvania Securities Commission did not determine that it would not enforce the Pennsylvania takeover statute against MITE's proposed tender offer until nine days after being petitioned by the subject company to do so (J.S. App. 4a).

offer and then to wait 20 business days before commencing the offer.[28] Despite this public announcement, the tender offer may never be consummated if the offeror does not obtain state regulatory approval in the pre-commencement period. The resulting uncertainty and delay increases the likelihood of irregular price and volume fluctuations in the securities of both the offeror and the subject company.[29] Since the functioning of the nation's secondary securities markets unquestionably constitutes interstate commerce,[30] the operation of the Illinois statute imposes substantial burdens on that commerce. See *Canadian Pacific Enterprises (U.S.), Inc.* v. *Krouse*, 506 F. Supp. 1192, 1203 (S.D. Ohio 1981), appeal pending, No. 81-3083 (6th Cir., filed Feb. 17, 1981).

2. *The Invalidated Provisions of the Illinois Statute Are Not Necessary To Serve Local Objectives*

The two local objectives cited by appellant are insufficient to justify the burdens imposed on interstate

---

[28] See note 18, *supra*.

[29] These disruptive effects were noted by Donald Calvin, Vice-President of the New York Stock Exchange, in testimony submitted during the passage of the Ohio takeover statute, which has an advance disclosure provision similar to that of the Illinois statute:

> During the 20-day [waiting] period there could be rumors, counter-offers and rumors of counter-offers which may result in price fluctuations to the extent that the market in the stock would be disrupted. This may make it necessary for the Exchange to temporarily halt trading in the stock. * * * The impact of the Ohio law would thereby be felt by investors throughout the Nation who would be deprived of a market for the securities they hold in the Ohio company.

Statement by the New York Stock Exchange on the proposed Ohio takeover statute, quoted in Sommer, *The Ohio Takeover Act: What Is It?*, 21 Case W. Res. L. Rev. 681, 700 (1970). See also pages 14-17, *supra*; *Great Western United Corp.* v. *Kidwell*, *supra*, 577 F.2d at 1283 n.55.

[30] See Section 2 of the Securities Exchange Act of 1934, 15 U.S.C. 78b.

commerce by the Illinois statute. Appellant argues (Br. 25) that Illinois seeks to protect resident security holders. He also contends (Br. 25-27) that Illinois, through its takeover law, is simply regulating the "internal affairs" of companies incorporated under Illinois law. Neither asserted interest, however, affords substantial support to the statute.

a. Protecting local investors is a legitimate state objective. However, the Illinois statute does not significantly further that objective. Consequently, the court of appeals was correct in concluding that "the benefits flowing to Illinois shareholders from the Act are, to a significant degree, speculative" (J.S. App. 26a); see also *Great Western United Corp.* v. *Kidwell*, *supra*, 577 F.2d at 1285. Moreover, even if the statute could be viewed as promoting local investor protection in some measure, the statute has a far broader reach than is needed to serve that interest.

The Illinois statute seeks to protect shareholders of the subject company by requiring disclosures regarding the offer and by according shareholders withdrawal, proration and equal consideration rights. However, because the Williams Act provides essentially the same substantive protections as those embodied in the Illinois statute, the state law provides little, if any, protection that was not guaranteed to all shareholders ten years before its enactment.[31] Likewise, it is questionable whether the additional disclosures called for by the Illinois statute, beyond those already mandated by Congress and the Commission under the Williams Act, significantly improve shareholders' ability to reach informed investment decisions.[32]

---

[31] Compare Ill. Ann. Stat. ch. 121½, § 137.59.C, D, E (Smith-Hurd Cum. Supp. 1980) (withdrawal, proration and equal consideration rights) with 15 U.S.C. 78n(d)(5), (6), (7) and 17 C.F.R. 240.14d-7 (same). See also J.S. App. 11a.

[32] As the Fifth Circuit observed in *Great Western United Corp.* v. *Kidwell*, *supra*, 577 F.2d at 1280-1281, additional mandatory

Even if the Illinois statute may be viewed as promoting local investor protection to some degree, the statute is far too broad to be justified on such a theory. The statute applies to any tender offer for a substantial number of the shares of any corporation that meets any two of the following conditions: (a) the corporation has its principal executive office in Illinois; (b) the corporation is organized under the laws of Illinois; or (c) the corporation "has at least 10% of its stated capital and paid-in surplus represented in" Illinois. Ill. Ann. Stat. ch. 121½, § 137.52.10 (Smith-Hurd Cum. Supp. 1980).[33] As a result, the Illinois statute can apply to a tender offer even if none of the subject company's shareholders reside in Illinois and no securities transactions take place in that state. But as the Fifth Circuit noted in *Great Western United Corp.* v. *Kidwell, supra*, 577 F.2d at 1283, 1285, a state has no legitimate interest in protecting nonresident investors if securities transactions do not take place within the state or substantially affect local investors.

b. As a second justification for the Illinois statute, appellant argues (Br. 25-27) that authority to enact the statute is inherent in the state's power to regulate the "internal affairs" of companies incorporated under Illinois law. This argument fails because (1) the Illinois statute is not designed to regulate the internal affairs of Illinois companies; and (2) the statute applies to corporations incorporated in other states and having their principal place of business in other states.

---

disclosures may actually confuse investors and obscure relevant information. See also *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438, 448 (1976), noting that "[s]ome information is of such dubious significance that insistence on its disclosure may accomplish more harm than good." The Court added that a requirement that management "bury the shareholders in an avalanche of trivial information * * * is hardly conducive to informed decisionmaking." *Id.* at 448-449.

[33] The Illinois statute also applies if 10% of the outstanding shares of the subject company are held by Illinois residents.

The "internal affairs doctrine" is a conflict of laws concept based on the recognition that a corporation would be greatly hampered in conducting its affairs if by doing business in more than one state it subjected itself to multiple and possibly inconsistent laws governing its internal relationships and activities.[34] Consistent with this rationale, the doctrine pertains to activities within the corporation and the relations between the corporation, its officers and directors, and its shareholders. The doctrine does not apply to relationships between shareholders and third parties, such as those arising from a tender offer. Accordingly, the Fifth Circuit in *Great Western United Corp.* v. *Kidwell*, *supra*, 577 F.2d at 1280 n.53, correctly concluded that a tender offer does not implicate the internal affairs doctrine.[35] While there may well be some internal affairs issues arising from a tender offer that could be regulated by a state, the Illinois statute addresses none of the issues touching upon the internal affairs of an Illinois subject company. Indeed, the statute's exclusive focus on transactions between shareholders and third parties *ipso facto* removes it from the category of "internal affairs" regulation.

Finally, the Illinois statute purports to regulate tender offers for the shares of corporations that are not incorporated in Illinois and have their principal place of business in other states (see note 33, *supra*). Thus, even if the Illinois legislature actually sought to govern the internal affairs of domestic corporations, the Illinois statute, which reaches companies incorporated elsewhere, has a

---

[34] *Restatement (Second) of Conflict of Laws* § 302, Comment b at 307-308 (1971). The doctrine thus furthers the same principles of free trade that underlie the Commerce Clause by facilitating interstate or multi-state business by corporations.

[35] See also *Restatement (Second) of Conflict of Laws*, *supra*, § 302, Comment e at 310, which cites the transfer of stock as an example of matters that are not within the scope of "internal affairs regulation."

broader scope than can be justified on the basis of that interest.

In short, appellant has wholly failed to cite a substantial state interest, which could not be achieved by less burdensome legislation, that justifies the obstructive effect of the Illinois Business Take-Over Act on interstate commerce. The Illinois statute therefore fails to satisfy the requirements of the Commerce Clause and was correctly invalidated by the courts below. See *Kassel* v. *Consolidated Freightways Corp.*, No. 79-1320 (Mar. 24, 1981), slip op. 7, 14-15; *id.* at 1-2 (Brennan, J., concurring).[36]

[36] Like the court of appeals (J.S. App. 22a n.25), we express no view about the constitutionality of provisions of the Illinois statute other than those discussed in this brief. We note that the Illinois statute contains a severability provision (Ill. Ann. Stat. ch. 121½, § 137.70.D. While interpretation and application of that provision are, of course, a matter of state law, the general rule is that "[u]nless it is evident that the legislature would not have enacted those provisions which are within its power, independently ofthat which is not, the invalid part may be dropped if what is left is fully operative as a law." *Champlin Refining Co.* v. *Corporation Comm'n*, 286 U.S. 210, 234 (1932).

Likewise, we express no view in this brief on the constitutional validity of takeover statutes enacted by other states, which may contain provisions differing from those of the Illinois statute.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

LAWRENCE G. WALLACE
Acting Solicitor General

WILLIAM F. BAXTER
Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

STEPHEN M. SHAPIRO
Assistant to the Solicitor General

RALPH C. FERRARA
General Counsel

PAUL GONSON
Solicitor

DANIEL L. GOELZER
Associate General Counsel

JAMES R. FARRAND
Assistant General Counsel

JAMES J. JUNEWICZ
Special Counsel

DAVID C. WILSON
Attorney
Securities and Exchange Commission

JULY 1981

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 351342 557